Supreme Court, U.S.
FILED

961269 FEB 10 1997

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1996

CHARLES S. GAITHER,

Petitioner,

v.

THE ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES D. NORVELL
State Bar No. 15109500
NORVELL & ASSOCIATES
744 Hickory Street
Abilene, Texas 79601
915-676-1617
915-676-4421 (Fax)

Attorneys for Petitioner, Charles S. Gaither

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

72 pp

QUESTIONS PRESENTED

1. Whether the Trial Court's findings of fact, which were affirmed without opinion by the Fifth Circuit Court of Appeals, were clearly erroneous. (Findings: 20(c); 33; 40(b)).

2. Whether the Trial Court's conclusions of law, which were affirmed by the Fifth Circuit Court of Appeals without opinion, constituted error and reversible error. (Conclusions: 1; 2; 3; 4; 5; 6(a)-(f); 7(a)-(d); 8; 9; 10).

3. Whether Petitioner's claim of racial discrimination was preserved through its administrative phase so that it could be presented to the Trial Court for adjudication on the merits.

PARTIES TO THE APPEAL BEFORE THE FIFTH CIRCUIT COURT OF APPEALS

The parties to this proceeding are:

1. Charles S. Gaither, Petitioner.
2. Leonard Graves, Associate Warden, United States Bureau of Prisons, and the Respondent's designated representative at trial.
3. James D. Norvell and Tom McIlhany, attorneys for Petitioner.
4. Claude D. Brown and Daniel Eckert of the United States Attorney's Office, for the Respondent.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE APPEAL BEFORE THE FIFTH CIRCUIT COURT OF APPEALS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

TABLE OF ABBREVIATIONS vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 28

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES CITED

Bagwell v. Susman, 165 F.2d 412 (6th Cir. 1947) 26

Baunchand v. Runyon, 847 F.Supp. 449 n.1, 450 (M.D. La. 1994) 22

Blake v. U.S. Department of Air Force, 794 F.2d 170, 172-73 (5th Cir. 1986) 24

Brockman v. Sweetwater County School District #1, 826 F.Supp. 1328, 1330 (D. Wyoming 1993), *aff'd*, 25 F.3d 1055 (10th Cir. 1994), *cert. den'd*, ___ U.S. ___, 115 S.Ct. 368 22

EEOC v. Safeway Stores, Inc., 714 F.2d 566, 574 (5th Cir. 1983) 23

Fulgence v. J. Roy McDermott and Company, 662 F.2d 1207, 1209 (5th Cir. 1981) 22

Meehan v. U.S. Postal Service, 718 F.2d 1069, 1073-74 (Fed. Cir. 1983) 24

Nowlin v. Resolution Trust Corp., 33 F.3d 498 (5th Cir. 1994) 12

Patel v. Derwinski, 778 F.Supp. 1450, 1455 (N.D. Ill. 1991) 21

Peartree v. United States Postal Service, 66 M.S.P.B. 332, 342 (MSPB 1995) 21

Stephens v. Connley 842 F.Supp. 1457, 1459 (M.D. Ga. 1994) 24

U.S. v. Mississippi Valley Generating Co., 364 U.S. 520, 526 (1961) 11

United States v. U.S. Gypsum Co., 333 U.S. 364, 68 S.Ct.R. 525, 92 L.Ed.2d 746 (1948) 10

TABLE OF AUTHORITIES – Continued

Page

Valdez v. San Antonio Chamber of Commerce 974 F.2d 592 (5th Cir. 1992) 11

Van Sickle v. Locke, 220 S.W.2d 919, 921 (Tex. Civ. App. – Dallas 1949, writ ref'd n.r.e.) 26

Weick v. O'Keefe, 26 F.3d 467 (4th Cir. 1994) 22

STATUTES AND REGULATIONS

5 USC §7702(a)(1) 1, 20 n.5

5 USC §7702(e)(3) 1, 20

28 U.S.C. § 1254(1) 1

29 C.F.R. §1613.213(a) 1, 21, 22

29 C.F.R. §1613.214(a)(2) 2, 21

29 C.F.R. §1613.215(a) 2, 28

29 C.F.R. §1613.402(a) 2, 20 n.5

29 C.F.R. §1613.403 ..... 2, 20 n.5

Rule 52(a), Federal Rules of Civil Procedure 10, 11

Local Rule 47.6 United States Court of Appeals for the Fifth Circuit 10 n.3

TEXTS AND TREATISES

Black's Law Dictionary at 2 (5th Ed. 1979) 25

Black's Law Dictionary at 972 (5th Ed. 1979) 27

TABLE OF ABBREVIATIONS

"Petitioner" and "Mr. Gaither" as used herein shall refer to Petitioner Charles S. Gaither.

"Respondent" as used herein shall refer to the United States Bureau of Prisons with whom Petitioner was and is employed. Of course, the Respondent actually named in the case is and must be the Attorney General of the United States of America.

"BOP" as used herein shall mean the United States Department of Justice Federal Bureau of Prisons.

"EEO" as used herein shall be the Equal Employment Opportunity Office of the United States Department of Justice.

"EEOC" as used herein shall mean the United States Equal Employment Opportunity Commission.

"FCC" as used herein shall mean Federal Corrections Camp.

"FCI" as used herein shall mean Federal Corrections Institution.

"Federal Circuit" as used herein shall mean the United States Court of Appeals for the Federal Circuit.

"MSPB" as used herein shall mean Merit Systems Protection Board.

"OIA" as used herein shall mean United States Department of Justice Federal Bureau of Prisons Office of Internal Affairs.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Charles S. Gaither, respectfully prays that a Writ of Certiorari issue to review the judgment of the Fifth Circuit Court of Appeals entered on November 13, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals (App. *infra*, 1a) was not reported. The District Court's opinions (App. *infra*, 5a-25a) also are unreported.

JURISDICTION

Judgment of the Fifth Circuit Court of Appeals was entered on November 13, 1996. This Court's jurisdiction to consider this Petition after rendition of judgment by a Court of Appeals is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS[1]

1. Rule 52(a), Federal Rules of Civil Procedure
2. 5 USC §7702(a)(1)
3. 5 USC §7702(e)(3)
4. 29 C.F.R. §1613.213(a)

[1] The rules and statutes referenced in this section are copied in full at App. 28a through 36a.

5. 29 C.F.R. §1613.214(a)(2)
6. 29 C.F.R. §1613.215(a)
7. 29 C.F.R. §1613.402(a)
8. 29 C.F.R. §1613.403

STATEMENT OF THE CASE

In this Title VII action, Petitioner alleges that he was wrongfully demoted and transferred because of race.

Prior to assuming the position of corrections officer with the BOP[2] in 1978, Petitioner amassed numerous awards and commendations in the field of corrections. His sterling record in corrections dates to his tour of duty with the United States Air Force, which ended in 1970 with an honorable discharge. Additionally, during his career with the BOP, aside from the matter giving rise to his discrimination complaint, Petitioner received no reprimands.

Petitioner attained the BOP rank of GS-9 during 1985. He was promoted to GS-11 Lieutenant in 1988 and transferred, effective March 24, 1988, to FCI Oxford, Wisconsin.

Because of complaints concerning food quality, quantity, and sanitation, the inmates at Oxford began a "food strike" on July 16, 1988. In response, prison officials implemented a contingency plan which *inter alia* required

---

[2] Because of the numerous departments and agencies to which reference is made in this Petition, a Table of Abbreviations is provided at page vi, *supra*.

an inspection, under the direction of the operations or supervising lieutenant (Petitioner), of the inmate dining rooms prior to their release for meals. Petitioner testified that as shift supervisor, he could delegate half, or all of the inspection of the dining rooms to his assistant, the activities lieutenant.

On July 22, 1988, the activities lieutenant working with Petitioner was John Thomas. As the time approached for the inmates' evening meal, Petitioner was notified that United States Marshals were at the institution to deliver four prisoners. Petitioner was responsible for their admission. Therefore, Petitioner delegated to Mr. Thomas responsibility for inspection of the facility's two dining halls. Petitioner then proceeded with the admission of the prisoners. As Petitioner was admitting prisoners, Lieutenant Thomas by radio told Petitioner that the dining halls were ready for prisoners. (Mr. Thomas denied having so contacted Petitioners, in a memo which he testified that he "apparently" wrote during 1988.) Petitioner then radioed the control center with instructions to begin calling prisoners for food service. Once the prisoners began filing into the dining rooms, Petitioner walked back toward the dining halls in order to take the place of Lieutenant Thomas. Before Petitioner could reenter the dining room, he encountered Associate Warden Leonard Graves in the compound area directly in front of prisoners. According to Corrections Officer Neal Plunkett, a large number of inmates were in the area and they may have witnessed the confrontation which followed between Mr. Graves and Petitioner. The confrontation was precipitated by Mr. Graves' contention that Petitioner had not personally performed the inspection and that inmates had been released to the dining room

before completion of the inspection. Petitioner testified that Mr. Graves appeared in a rage; his face and gestures displayed anger, and he spoke to Petitioner, in front of staff and inmates, in "a loud, horrendous tone of voice." In describing the manner in which Mr. Graves questioned him, Petitioner testified that Mr. Graves "yell[ed] and holler[ed] at [him] like a dog, like somebody who has no sense." Petitioner responded that he would not accept yelling, was through speaking with Mr. Graves, and that Mr. Graves should locate Petitioner's supervisor, Captain Mackey. Mr. Graves then departed, and Petitioner assumed his duties inside the dining room. Captain Mackey and Mr. Graves returned and Petitioner was told by Captain Mackey that he was relieved of duty. Petitioner was escorted from the dining hall and Captain Mackey requested Petitioner's keys and radio in front of inmates and staff. Staff personnel then escorted Petitioner from the facility in a manner normally reserved for those who have committed a serious breach of security or a criminal violation. Thereafter a notice containing Petitioner's picture and stating that he was not authorized to enter the institution, was posted.

By letter to Petitioner dated July 27, 1988, Captain Mackey stated that on July 22, 1988, Petitioner had failed to carry out instructions, committed insubordination, and made a false statement. He recommended that Petitioner be demoted to the position of GS-9. Petitioner responded to the letter but was notified by letter from then Warden Edward Brennan, dated August 26, 1988, that he was demoted to GS-9. Warden Brennan's letter advised Petitioner that he could appeal the decision to the MSPB *and*

the EEO. The letter did not state that Petitioner must elect one or the other of these procedural routes.

In a timely manner, Petitioner met with EEO Counselor Annette Kittman (Annette Zuehkle at trial). Ms. Kittman testified that at the time of the meeting she did not understand the MSPB process and did not explain it to Petitioner. Ms. Kittman further testified that at the completion of the meeting, Petitioner was unsure of which route he would take to pursue his complaints. At the meeting, Ms. Kittman did not give Petitioner a Notice of Final EEO Interview or Notice of Right to File an EEO Complaint. Of substantial significance, Ms. Kittman did not advise Petitioner that he had to make an election of EEO or MSPB procedure, nor did she advise him of the consequences or effect of an election. Petitioner initiated a complaint through the MSPB but testified that in reliance upon Ms. Kittman's advice he subsequently requested that the complaint be amended to include an EEO complaint of racial discrimination.

By notice of September 1, 1988, Petitioner was reassigned to the FCI Marion, Illinois, effective September 25, 1988. By letter of October 3, 1988, the BOP recommended that Petitioner be removed from his position for having failed to appear for duty at Marion FCI. By letter of October 12, 1988, Petitioner explained to the BOP that he did not feel mentally capable of reporting for duty at that time because of the events which transpired at Oxford, and requested one additional month in which to prepare for duty. Petitioner's request for an additional month's leave was denied. By letter dated October 24, 1988, Petitioner was reassigned as a GS-9 to Metropolitan Corrections Center, Chicago, Illinois, with the assignment effective November 6, 1988. By letter dated October 27,

1988, Petitioner wrote the BOP requesting an indefinite leave without pay as he continued to feel mentally unable to perform the duties required. By letter dated November 3, 1988, and mailed from Kansas City, Missouri, to Petitioner in Wisconsin, Petitioner was notified that if he did not report for duty by November 6, 1988, he would be placed on absent without leave status ("AWOL").

It was recommended by letter of November 29, 1988, that Petitioner be removed as a GS-9 for failure to accept an assignment and being absent without leave. The AWOL charge against Petitioner was sustained and he was removed from his position effective January 6, 1989. The letter notifying Petitioner of this decision contained no notice of a right to file an EEO complaint.

On January 7, 1989, Petitioner wrote to the Administrative Judge and requested that his existing MSPB appeal be amended to include the dismissal action. Petitioner then contacted Gil Ingram, Ph.D., Assistant Director of the BOP by letter dated January 10, 1989, and requested assistance. Petitioner had previously worked under Dr. Ingram. Following receipt of Petitioner's letter, a telephone conversation was had between Petitioner and Dr. Ingram. Petitioner testified that in the course of the telephone conversation, he and Dr. Ingram reached an agreement whereby in consideration for withdrawing his two appeals, Petitioner would be restored to his prior rank of GS-11 along with all back benefits. It was Dr. Ingram's proposal to make the settlement agreement and Petitioner testified that he did not request that it be reduced to writing because of Dr. Ingram's "integrity, his ability, and just how [Petitioner] had known him as a person."

Meanwhile, the MSPB, in its *Initial Decision* of January 10, 1989, sustained Petitioner's demotion and denied

his claims of racial discrimination. On January 25, 1989, Petitioner appealed to the MSPB the BOP's decision to remove him from his position. By notice of February 9, 1989, Petitioner sought review by the MSPB of its *Initial Decision* of January 10, 1989, sustaining his demotion and denying his claims of racial discrimination. In reliance upon the existence of a settlement agreement, Petitioner, by letter of April 4, 1989, notified the BOP that he had withdrawn his complaint to the MSPB concerning demotion and racial discrimination. Petitioner was transferred to the FCC Big Spring, Texas. The BOP, meanwhile, filed a motion to dismiss Petitioner's appeal of his termination claiming "the [removal] action was never effected." Petitioner again wrote to Dr. Ingram on April 7, 1989, pointing out that since he had dropped his complaints against the agency, he was ready to be reinstated as a GS-11 with benefits including back pay. Having not been restored to his prior position or benefits, Petitioner, by letter of December 12, 1989, notified the MSPB that he was rescinding his termination of the appeal (of his demotion and claims of racial discrimination) and requested that his complaint be reviewed. The MSPB issued an order dated March 9, 1990, vacating the Initial Decision of the MSPB (which sustained Petitioner's demotion and denied his claims of racial discrimination) and dismissing his appeal thereof. Petitioner was appearing *pro se* at the time and believed the order to mean that he had prevailed. By memo of May 2, 1990, Petitioner restated to Associate Warden Beasley at Big Spring FCC that he had been at Big Spring over a year and had been advised by "executive staff" not to start outside legal proceedings before allowing the "process" to work. Those having given Petitioner "executive staff advice" were Wardens Spears and

Fitzpatrick at Big Spring. Additionally, Petitioner was told that he should rely on the officials and let the system work, as the officials knew a wrong had been done and it would be corrected. Over the remainder of 1990, Petitioner continued, albeit unsuccessfully, in his efforts to obtain relief from the BOP.

On February 19, 1991, Petitioner sent Ted McBurrows of the EEO his "official complaint" of racial discrimination. Mr. McBurrows, by letter of April 2, 1991, notified Petitioner that regarding his EEO complaint, Ms. Jane Redmon would write to him and "advise" him of his rights and obligations. Approximately six months passed from Petitioner's receipt of Mr. McBurrows' letter until Petitioner was first contacted by Ms. Redmon. During the period of Ms. Redmon's silence, Petitioner wrote to her requesting an update on the status of his complaint, but no response was made.

At Petitioner's request, between October 25, 1991, and November 8, 1991, an OIA investigation of his claim was conducted. The investigation was nothing more than a review of Petitioner's complaint file with the BOP. The OIA investigator pronounced the conduct of BOP officials in dealing with Petitioner as appropriate and closed the matter.

Despite the fact that Petitioner had seen Ms. Kittman, an EEO counselor in 1988, Mr. McBurrows advised Petitioner in June, 1992, that if he desired to have his allegations addressed, he had to see an EEO counselor and file a complaint. In response to Petitioner's request for permission to travel to Oxford, Wisconsin, from Big Spring, Texas, in order to see an EEO counselor, Mr. Turnbo, by letter dated July 23, 1992, told Petitioner that he had

asked the warden at Big Spring to "once again explore the outcome [Petitioner was] seeking to [his] complaint." While the staff at Big Spring had been "exploring the outcome" with Petitioner on prior occasions, no one told him of his rights procedurally as to official complaints of racial discrimination. For what was his *second EEO interview*, Petitioner traveled to Oxford, Wisconsin, at his own expense and on his own time to counsel with Ms. Nancy Magnifico of the EEO. Petitioner traveled to Wisconsin to file the complaint because he was so told by Ms. Redmon. During this period of time, no one with the BOP expressed to Petitioner any urgency about immediately proceeding to hearing or court. After meeting with Ms. Magnifico, Petitioner signed his "Notice of Final Interview with EEO Counselor" on October 21, 1992. Thereafter, Petitioner filed a complaint of racial discrimination dated October 23, 1992. By letter received December 11, 1992, Ms. Redmon advised Petitioner that she recommended his complaint be dismissed because: (1) he did not see an EEO counselor within 45 days of the discriminatory act and file a complaint within 15 days of the conclusion of counseling; (2) Petitioner had also raised his complaint with the MSPB. For the grounds stated in Ms. Redmon's letter to Petitioner, the EEO dismissed Petitioner's complaint on June 3, 1993. Petitioner timely appealed the decision to the EEOC and by an opinion dated September 16, 1993, the EEOC remanded the case to the BOP for additional findings, to be completed within 30 days of receipt of the decision. On April 8, 1994, the EEOC contacted the EEO staff and pointed out that notwithstanding "several unsuccessful attempts by the EEOC to obtain compliance with the September 16, 1993 order, no evidence of implementation had been shown."

Therefore, the EEOC requested compliance within 20 days of April 8, 1994. By letter to Petitioner of January 19, 1995, the EEOC stated that it had determined the EEO was "in the process of complying with" the September 16, 1993, order. At the time Petitioner received this correspondence, and because of the agency's refusal to comply with the EEOC's order, Petitioner's suit had been on file for nine months.

Trial of the case to the Court began on September 6, 1995. Following the entry of an adverse Judgment (App. 3a), Order (App. 4a), and Findings and Conclusions (App. 5a), Petitioner timely perfected an appeal. Oral argument was held on November 5, 1996, and the Appellate Court's order affirming the Trial Court (App. 1a) was filed November 13, 1996.

REASONS FOR GRANTING THE WRIT

The competent proof adduced at trial established Respondent's egregious, discriminatory treatment of Petitioner. Yet, the Findings of Fact and Conclusions of Law of the Trial Court, which were affirmed by the Appellate Court without an opinion, as allowed by local rule,[3] foreclosed any relief to Petitioner. While Rule 52(a), Federal Rules of Civil Procedure, provides that "findings of fact shall not be set aside unless clearly erroneous", nevertheless, in reviewing the Trial Court's findings the Appellate Court may examine all of the evidence, *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). The

[3] Local Rule 47.6 of the Fifth Circuit Court of Appeals. This rule is set forth in its entirety at App. 27a.

Appellate Court will give great weight to the findings and inferences drawn by the trial judge, but it must reject those findings which it determines to be clearly erroneous. It remains settled that "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* Of course, the Appellate Court's review of conclusions of law is *de novo* without the "clearly erroneous" restriction applying. *U.S. v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961). In the matter at bar, the evidence supports the conclusion that a definite and firm mistake has been committed in the Findings of Fact, and that by affirming the Trial Court's findings, the Court of Appeals has effectively placed upon Petitioner an even more stringent standard for the review of Findings of Fact than required by Rule 52(a). Further, on legal grounds, the trial court, and the appellate court, foreclosed Petitioner's day in Court because of found procedural errors of Petitioner. Accordingly, this case also affords the Court an opportunity to review the procedural labyrinth with which Petitioner, and others similarly situated, are confronted in a Title VII case.

I. THE MERITS OF PETITIONER'S CASE.

The Complainant in a Title VII action must first establish a *prima facie* case of alleged wrongdoing by a preponderance of the evidence. This showing is met by proof that the Complainant: (1) is a member of a protected group; (2) was qualified for the job held; (3) was discharged; and (4) that after discharge, the position was filled by a person who was not a member of a protected group. *Valdez v. San Antonio Chamber of Commerce*, 974

F.2d 592 (5th Cir. 1992). Once a *prima facie* case has been established, there is a presumption of discrimination. The Defendant must then articulate some legitimate non-discriminatory reason for its adverse employment action. *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498 (5th Cir. 1994). If the Defendant articulates a legitimate non-discriminatory reason for its adverse employment action, the presumption of discrimination created by establishment of a *prima facie* case vanishes and the Complainant must prove that the reason articulated by the Defendant was false and that the Defendant's real reason was discriminatory or otherwise prohibited by Title VII. *Id.*

A. Petitioner's Prima Facie Case.

It is undisputed that Petitioner is a male of African-American descent. His supervisor, Captain Mackey, testified that at the time Petitioner was stationed at Oxford FCI, there was no question that Petitioner was qualified for the position held. Petitioner was replaced at Oxford by a white male employee. Finally, it is undisputed that Petitioner was demoted and ordered transferred.

B. Respondent's Reason for Discipline and Demotion.

Respondent contended that its discipline and demotion of Petitioner were justified because of Petitioner's alleged failure to carry out instructions, insubordination, and the utterance of a false statement.

(1) **Instructions to Petitioner**: It was claimed by Respondent that in the midst of a food strike Petitioner

was to personally inspect both sections of the dining hall while being observed or assisted by an activities lieutenant. Once the dining hall and food were inspected, inmates were then to be allowed food service. Yet, Respondent's proof of what instructions it gave Petitioner was lacking. According to the testimony of Petitioner, under the instructions given, he was to insure the inspection was done properly, but that if a situation more important than inspecting the serving utensils and tasting food arose, then he was authorized to delegate the inspection to the activities lieutenant. Petitioner further testified that Captain Mackey delivered the instructions on conducting the inspection to Petitioner and Lieutenant Sears. Lieutenant Sears stated that he and Petitioner were simultaneously instructed in the inspection procedure by Captain Mackey, that according to instructions, as well as normal operating procedures, the operations lieutenant could delegate to the activities lieutenant inspection of one side of the dining room. Mr. Sears further stated that Captain Mackey did not specifically state that the operations lieutenant was solely responsible for the inspection, although Mr. Sears had no doubt that the operations lieutenant was in charge. Captain Mackey testified that he did not know whether Petitioner and Lieutenant Sears were jointly instructed concerning their duties under the inspection plan. However, Captain Mackey believed that under the plan there could be some delegation of duties from the operations lieutenant to the activities lieutenant. Of significance, he conceded that *if an event requiring the attention of the operations lieutenant arose, then the activities lieutenant could inspect the entire dining room.* When United States Marshals arrived at the facility on July 22, 1988,

Petitioner did not believe Mr. Thomas was qualified to handle the admission of prisoners. Therefore, and consistent with instructions, he delegated the inspection to Mr. Thomas and handled the admission of prisoners himself. Contrary to Captain Mackey, Warden Brennan testified that his belief was that the operations lieutenant should inspect the cups, dishes, silverware, and taste the food while assisted by the activities lieutenant; however, the operations lieutenant could taste the food. Conversely, Associate Warden Graves testified that under Warden Brennan's plan there could be no delegation of food tasting. Moreover, when presented with the statement of Lieutenant Sears, which Warden Brennan allegedly obtained, Warden Brennan testified that at the time of the statement he may have presumed that Captain Mackey misstated the instructions.

Thus, the Respondent's evidence of the instructions' substance ran the spectrum from agreeing that Petitioner could delegate responsibility if the need arose, to requiring the entire inspection to be performed by Petitioner. Further, it is nonsensical to contend that a corrections officer with 18 months' experience, such as Mr. Thomas, could not examine cups, saucers, plates, and taste food while Petitioner made certain that incoming prisoners were properly processed. Respondent simply did not adduce sufficient proof of instructions fixing certain the duties of the operations lieutenant and activities lieutenant. It cannot be gainsaid that Petitioner acted prudently in admitting the Marshals and their prisoners while allowing a corrections officer, of less experience, to inspect and taste food.

(2) **Petitioner's Alleged Insubordination**: The Respondent further claimed it was justified in its treatment of Petitioner because of his alleged insubordination. According to Respondent this conduct took place when Petitioner was initially approached by Mr. Graves on July 22, 1988. Mr. Graves testified that Petitioner was insubordinate because he cut Mr. Graves off while he, Mr. Graves, was trying to obtain information from Petitioner. Mr. Graves claimed that Petitioner interrupted him in "a very obstinate and belligerent demeanor" to tell Mr. Graves that he, Petitioner, was in charge. Mr. Graves further testified that Petitioner interrupted him only after Mr. Graves had made statements to Petitioner concerning the inspection plan. According to Mr. Graves, because Petitioner's interruption was with "a very obstinate and belligerent demeanor," he chose to walk away. Mr. Graves added that he did not remember Petitioner saying that he, Mr. Graves, should send for Captain Mackey because Petitioner would not tolerate yelling, nor did he remember Petitioner telling Mr. Graves to "wait a minute" as he, Petitioner, was the operations supervisor. Respondent did not corroborate the testimony of Mr. Graves with that of another witness. Conversely, Petitioner testified that at the time in question, Mr. Graves approached him asking why the inmates were released for the evening meal and in so doing spoke in "a loud, horrendous tone of voice." Additionally, Mr. Graves appeared to be in a rage; his face and gestures conveyed to Petitioner anger. Petitioner testified that in the course of Mr. Graves' confrontation with him, Mr. Graves "yell[ed] and holler[ed] at [him] like a dog, like somebody who has no sense." Mr. Graves testified that he did not remember whether he used hand

gestures in front of Petitioner, but agreed that if he had done so and had talked in a loud voice in front of others, it would have been a "bad" procedure. Warden Brennan agreed that if an associate warden addressed an operations lieutenant with loud, insulting language and hand gestures in the presence of inmates, then the conduct would be a violation of policy subjecting the associate warden to discipline up to removal. According to the belief of Captain Mackey, BOP policy specifies that discipline not be administered in front of inmates and staff. Further, Captain Mackey said he believed that relieving Petitioner of duty should have been done in an office and not on the compound outside the west dining hall entrance.

(3) **Alleged False Report**: Respondent's final non-discriminatory basis was a claim that Petitioner falsely reported to Mr. Graves that he, Petitioner, had been told by Mr. Thomas that the dining hall inspection had been completed. Petitioner testified specifically and distinctly that Lieutenant Thomas told him that he had checked the food service facilities and that the dining facilities were ready to begin serving the inmates. Mr. Thomas testified he had no recollection whatsoever of the events which transpired at Oxford FCI during 1988 as he had subsequently suffered two strokes caused by "a rare illness . . . relating to an autoimmune disorder." Mr. Thomas did state that Respondent's Exhibit 86[4]

[4] In this memorandum, allegedly authored by Mr. Thomas, Mr. Thomas denied having told Petitioner that the inspection was completed and the inmates could be admitted for their meal.

"appear[ed] to be a memorandum" which he had written. However, after reviewing the document, he conceded that his memory was not refreshed. That at trial Mr. Thomas was experiencing difficulty with his memory was evidenced by the fact that although his testimony was only for a brief period, he initially stated his rank was GS-9, but moments later stated that it was GS-8. Further, Mr. Thomas testified that while his memory was not refreshed by reviewing Respondent's Exhibit 86, he could remember some facts concerning his employment with the BOP shortly after July 22, 1988. Clearly in making its determination to discipline and demote Petitioner, the BOP favored Mr. Thomas, a white officer of lesser rank, over Mr. Gaither. Yet at trial, Mr. Thomas had absolutely no memory whatsoever of the relevant events.

C. The Respondent's Reasons for Disciplining and Demoting Petitioner were a Mere Pretext for Racial Discrimination.

Petitioner came to Oxford FCI with a sterling personnel record in corrections. Never before in both military and civilian corrections work had his conduct been questioned, much less held as a cause for discipline. Yet because of the Respondent's above claims, in very short order Petitioner was publicly humiliated, made emotionally ill, and stripped of his GS-11 rank. There was more to Respondent's actions than the half-hearted reasons offered.

The credible evidence established factors which show the treatment of Petitioner was motivated by racial discrimination. At the time of Petitioner's promotion and

transfer to Oxford FCI, Oxford, Wisconsin, had few, if any, residents of African-American descent. Mr. Keith O'Neil of the BOP testified that the Oxford area is not one frequently chosen by minorities as a place of residence. During August of 1987, Warden Edward Brennan took command of Oxford FCI. According to Mr. O'Neil, at the time Warden Brennan assumed his duties at Oxford, 95.8% (275) of the prison's employees were white and 2.8% (8) were black. By August of 1988, 97.9% of the prison's employees were white (274) and 1.1% (3) were black. Further, by January, 1989, 98.2% (272) of the prison employees were white and 0.7% (2) were black. For the period of time beginning July 22, 1988, and continuing through 1989, 28 instances of official employee discipline at Oxford FCI involved whites, three instances involved blacks, and one instance involved a Native American. Mr. O'Neil did not know whether any black employees were disciplined more than once. Petitioner's replacement at the Oxford facility was a white male. By July of 1988, there was segregation among the Oxford inmate population even though such a practice is against BOP policy. When Petitioner arrived at Oxford FCI to begin his duties, he was not greeted by Warden Brennan nor by Mr. Graves. Yet Warden Brennan testified that he believed it important to meet and greet new employees. In March of 1988, Petitioner was Oxford FCI's only black lieutenant, and there were no other black supervisors at the facility. Lieutenant Sears told Petitioner that at Oxford FCI black staff members were not treated humanely and were not welcome. He also told Petitioner that Associate Warden Graves had a problem with blacks and did not want them working for him; that Mr. Graves sometimes used the

term "nigger"; and that Mr. Graves on occasion stated that "niggers" lacked intelligence and should not be working. Captain Mackey testified that he believed the conversation in which Petitioner was relieved of duty should have been conducted in an office and not on the compound outside the west dining room entrance. He also said that BOP policy specifies that discipline not be administered in front of inmates and staff. After being relieved of his keys and radio, Petitioner was escorted from the facility in a manner normally reserved for those who have committed a serious breach of security or criminal violation. Mr. Graves admitted that it was unusual to escort a senior supervisor, such as Petitioner, out of the institution. Captain Mackey testified he could not remember having seen anyone treated as was Petitioner on July 22, 1988. Thereafter a notice containing Petitioner's picture and stating that he was not authorized to enter the institution, was posted at the facility. Captain Mackey later told Petitioner that Mr. Graves influenced him to seek Petitioner's demotion. Yet Captain Mackey did not see Petitioner act in a loud or disrespectful manner toward Mr. Graves, nor did he know of any complaints or problems with inmate food service on July 22, 1988. Contrary to the Respondent's claim, the prison control log did not establish the precise time that United States Marshals arrived at the facility. Warden Brennan conceded that the Marshals might have been delayed in the facility thus resulting in the time entered in the control log for their arrival at the institution. Warden Brennan further testified that he knew of no evidence to contradict Petitioner's evidence that he returned from processing the Marshals and prisoners and went to the west wing of the

dining hall. Nor did Warden Brennan know of any evidence to contradict Petitioner's testimony that Petitioner began processing the Marshals and prisoners before going back to the west wing of the dining hall.

II. ADMINISTRATIVE AND PROCEDURAL ISSUES.

A. Petitioner's Claims Were Properly Before the Trial Court for Adjudication on the Merits.

By proceeding with the MSPB appeal of his mixed case[5], Petitioner did not make an election barring EEOC proceedings and the presentation to the District Court of his claim for adjudication on the merits. At the time of dismissal of his MSPB appeals, and at all times until Petitioner received his Notice of Final Interview with EEO Counselor, which directed him to file his complaint by November 5, 1992, Petitioner's EEO claim continued to exist. This is true since the election regulation, 29 C.F.R. §1613.403, may not operate to prevent Petitioner from obtaining trial *de novo* of his Title VII claim. 5 USC §7702(e)(3). Further, and in violation of 29 C.F.R. §1613.403, Ms. Kittman did not advise Petitioner that he was procedurally bound to follow the requirements of the

---

[5] In certain instances, a Federal employee aggrieved by an agency's decision which was effected because of discrimination, may appeal the entire complaint to the MSPB. 5 U.S.C. §7702(a)(1). Such cases are known as "mixed cases." 29 C.F.R. §1613.402(a). In conferring with the complaining employee in a mixed case, the agency representative *must* make certain disclosures, including notice that whichever claim is first filed (MSPB or EEO) shall be considered an election to proceed in that forum. 29 C.F.R. §1613.403.

EEO or MSPB, depending upon to which he first complained. A valid election will not take place if the agency does not adequately notify the claimant of the election requirement and the consequences of making such an election. *Peartree v. United States Postal Service*, 66 M.S.P.B. 332, 342 (MSPB 1995) (in mixed case, Board deferred to prior EEOC findings that the Petitioner had not made a valid election as she was not adequately notified of the election requirement and the consequences of such an election). Further, the MSPB declared it was without jurisdiction because of the appeal's withdrawal, but it did not notify Petitioner to contact an EEO counselor. It also advised Petitioner that if the Federal Circuit had jurisdiction, which it did not since Petitioner presented a mixed case, he could seek judicial review of the decision.

Accordingly, since Petitioner may not be barred by the proceedings initiated through the MSPB from obtaining his day in Court, the question remains: whether under the statutes and regulations of the EEOC he exhausted administrative remedies and had a right to present his claims in District Court?

Once a complaint is brought to the attention of an EEO counselor, it is the counselor who begins the informal pre-complaint processing stage. *See*, 29 C.F.R. §1613.213(a). An EEO counselor is prohibited from receiving a complaint against an agency. 29 C.F.R. §1613.214(a)(2); *Patel v. Derwinski*, 778 F.Supp. 1450, 1455 (N.D. Ill. 1991). If the counselor's efforts to informally reconcile the complaint fail, the employee must be notified of the right to file a complaint through a "Notice of Final Interview" form. *Id.* A complaining employee *must*

receive the Notice of Final Interview *before* a formal complaint with the agency can be filed. *Id.*; 29 C.F.R. §1613.213(a). Indeed, a formal complaint brought prior to receipt by an aggrieved party of a notice of termination of final interview will be rejected as premature. *Baunchand v. Runyon*, 847 F.Supp. 449 n.1, 450 (M.D. La. 1994); *Weick v. O'Keefe*, 26 F.3d 467 (4th Cir. 1994).

From the time Petitioner initially met with Ms. Kittman in 1988, until EEO counselor Nancy Magnifico provided him with a Notice of Final Interview in October of 1992, Petitioner's complaint of discrimination remained viable with the EEO. Indeed, since obtaining the EEO's Notice of Final Interview is a condition precedent to filing a formal complaint, there was nothing which Petitioner could have properly done in order to pursue the complaint. The record is replete with Petitioner's efforts to obtain the EEO's cooperation. Accordingly, Petitioner's formal complaint to the EEO was timely filed.

B. The Alleged Settlement.

In seeking to enforce the settlement of a civil rights claim, the party moving for enforcement bears the burden of establishing the absence of any genuine issue of material fact concerning the agreement. *Brockman v. Sweetwater County School District #1*, 826 F.Supp. 1328, 1330 (D. Wyoming 1993), *aff'd*, 25 F.3d 1055 (10th Cir. 1994), *cert. den'd*, ___ U.S. ___, 115 S.Ct. 368. Although an oral contract for settlement of a civil rights claim may be enforceable, *Fulgence v. J. Roy McDermott and Company*, 662 F.2d 1207,

1209 (5th Cir. 1981), nevertheless, there must be compliance with the regular rules of contract law and the settlement must not conflict with the individual rights of the parties or the purposes of Title VII. *EEOC v. Safeway Stores, Inc.*, 714 F.2d 566, 574 (5th Cir. 1983). In the matter at bar, Respondent's evidence was legally insufficient to establish a settlement agreement according to the terms which it alleged.

All Respondent offered to prove the claimed agreement was the testimony of Dr. Ingram. He stated that a handwritten note which passed between he and Mr. Foley of the BOP, on an unspecified date, contained the terms of the settlement. The undated note states, "Jim, he will drop everything and take a GS-9 counselor position at Big Spring. You are welcome, Gil." As to when the note was written, all Dr. Ingram could say was it took place "after I [Dr. Ingram] had talked with him and subsequently received this note from Mr. Foley." Further, neither Dr. Ingram, nor anyone acting on behalf of the BOP responded to Petitioner's correspondence to Dr. Ingram or Warden Beasley in which Petitioner expressed his understanding of the terms of the agreement.

In reliance upon the restoration of GS-11 status and back pay, Petitioner dismissed his MSPB appeals. The claimed settlement agreement was not reduced to writing, Petitioner was not restored nor compensated with back pay, and the Respondent took the position after dismissal of the MSPB appeals that Petitioner was not to have been restored nor provided back pay. Thus, Petitioner was left without the benefit of his bargain, and according to Respondent, no right of further relief.

C. Appeal to the Federal Circuit.

In general, MSPB decisions are reviewable by the Federal Circuit; however, that Court is without jurisdiction to consider the appeal of decisions involving mixed cases. *Blake v. U.S. Department of Air Force*, 794 F.2d 170, 172-73 (5th Cir. 1986). Whether a discrimination claim has been eliminated from an MSPB complaint is determined on a case by case basis. *Stephens v. Connley*, 842 F.Supp. 1457, 1459 (M.D. Ga. 1994). Factors, although not conclusive, which the Court may consider in making such a determination are: whether the MSPB petition adequately sets forth a discrimination claim, *Meehan v. U.S. Postal Service*, 718 F.2d 1069, 1073-74 (Fed. Cir. 1983); whether evidence of discrimination was presented to the MSPB; *Id.* at 1073; whether issues of discrimination were raised in seeking review of the Administrative Judge's decision; *Id.*; whether the petitioner waived his/her claim of discrimination before the MSPB. *Blake supra*, 794 F.2d at 72.

Petitioner's original petition to the MSPB and its supporting exhibits, the Administrative Judge's *Initial Decision* of January 10, 1989, and Petitioner's request for review of the *Initial Decision* of February 9, 1989, all concerned a mixed case. Yet, when the MSPB dismissed Petitioner's case, the only notice of appellate rights which it provided Petitioner was that he could appeal to the Federal Circuit if *that Court had jurisdiction*. As the Court had no jurisdiction to consider the appeal of a mixed case, such as Petitioner's, Petitioner should not be punished for having acted in a manner consistent with the MSPB's instruction. Of course, as discussed above, Petitioner never made a binding election, so his EEO complaint remained viable.

D. Abandonment, Election, Obstruction, Failure to Diligently Prosecute.

Apparently based upon Petitioner's request for an investigation of his complaint by the OIA of October 14, 1991, the Court concluded and found that Petitioner was not entitled to an adjudication of his claims on the merits. This basis for denying Petitioner access to the Courts had not previously been raised nor found by the agency or EEOC.

An abandonment may occur when a party voluntarily surrenders, relinquishes, disclaims, or ceases rights or property. Exercise of abandonment includes both the subjective intention to abandon as well as the objective external act by which the intention is effectuated. *Black's Law Dictionary* at 2 (5th Ed. 1979).

Petitioner was told that to process his EEO complaint, Ms. Jane Redmon would contact him. Notwithstanding Ms. Redmon's silence and Petitioner's effort to reach her, it was only after Petitioner recontacted BOP Director Michael Quinlan that he was contacted by Ms. Redmon. However, Ms. Redmon advised Petitioner that it was "very possible" that his EEO complaint would be "rejected for processing." Therefore, by October of 1991, Petitioner had been told by various prison officials that he should not pursue legal action but should let the internal process take care of the wrong committed; he had exhausted all appellate options without success; he had no EEO redress as his complaint would probably be rejected. Petitioner, not trained in law nor represented by counsel, requested a complete OIA investigation. The "complete" investigation Petitioner envisioned did not

take place. Rather, in a time frame of less than two weeks, the OIA did nothing more than examine the complaint file maintained in the EEO office of the BOP. No one with BOP, EEO, OIA, or for that matter in any way affiliated with the Respondent, advised Petitioner that if the OIA became involved, it would one day be alleged against Petitioner that by making such a request Petitioner would be denied the adjudication of his claims on the merits. Moreover, once the OIA concluded its "investigation", Petitioner was not told of any rights of further redress or review. Asking for such an investigation w s never intended by Congress as a substitute for Petitioner's day in Court.

If it was the Court's intention, it was error to find (or conclude) that Petitioner made a *binding* election of remedies forever selecting an OIA investigation over an EEO complaint. (Finding 33). Nothing more than a file favorable to the agency was examined by the OIA, notwithstanding Petitioner's request for a complete investigation of his complaints. So cursory was the investigation, that Petitioner believed his request was denied as the OIA advised him that it had looked at his file and considered the matter closed. In general, election of remedies involves the act of a party in choosing between two or more inconsistent but co-existing modes of procedure and relief allowed by law on the same state of facts. *Van Sickle v. Locke*, 220 S.W.2d 919, 921 (Tex. Civ. App. - Dallas 1949, writ ref'd n.r.e.). Election of remedies is an affirmative defense which must be expressly set forth. *Bagwell v. Susman*, 165 F.2d 412 (6th Cir. 1947).

There was no election of remedies. It was not inconsistent for Petitioner to pursue an OIA investigation and

an EEO claim. An OIA investigation and pursuit of an EEO claim are not co-existent means of obtaining redress, including damages, for acts of racial discrimination. Further, there was no affirmative pleading by the Respondent setting forth its contention that by requesting an OIA investigation, Petitioner had elected the OIA investigation to the loss of his EEO discrimination complaint. By its conduct, Respondent should be estopped to claim a binding election of remedies and such a claim was waived by the agency's subsequent conduct in allowing Petitioner to pursue his EEO/EEOC complaint. Finally, there can be no binding election of remedies because the OIA did not perform a complete investigation as was requested by Petitioner, and no one advised Petitioner of the effect of such an election.

Obstruct means to "hinder or prevent from progress, check, stop, also to retard the progress of, make accomplishment of difficult and slow. . . . To impede; to interpose impediments to the hinderance or frustration of some act or service, as to obstruct an officer in the execution of his duty." *Black's Law Dictionary* at 972 (5th Ed. 1979). The only act which the Court specifies in its Conclusions, as constituting obstruction as a bar to relief, is Petitioner's having requested an OIA investigation. It is clear that Petitioner was seeking assistance in whatever manner it might be obtained. Yet, there is simply no evidence that Petitioner impeded or thwarted the efforts of the EEO in handling his claim. Indeed, the record is replete with evidence that it was the EEO and the staff of Respondent which consistently thwarted Petitioner's efforts in obtaining relief.

It was further found that Petitioner had not pursued his claims with due diligence. This case involves a substantial record of communication between Petitioner, the BOP, the MSPB, the EEO and the EEOC. Indeed, Ms. Redmon of the EEO commented in 1991 that Petitioner's file revealed there had been "quite a bit of correspondence between Mr. Gaither and the Bureau regarding these matters." (D.X. 39). There was at no time an agency nor EEOC finding that Petitioner did not diligently pursue his claims. In this regard, had the agency felt that Petitioner was not diligent in pursuing his claims, it could have "cancelled" his allegations of racial discrimination for "failure to prosecute." 29 C.F.R. §1613.215(a). However, it is undisputed that there was never even a threat that the cancellation process would be undertaken.

CONCLUSION

For the reasons stated, Petitioner, Charles S. Gaither, prays that this Court grant a Writ of Certiorari to review the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

JAMES D. NORVELL
State Bar No. 15109500
NORVELL & ASSOCIATES
744 Hickory Street
Abilene, Texas 79601
915-676-1617
915-676-4421 (Fax)

Attorneys for Petitioner,
Charles S. Gaither

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-11076

CHARLES S. GAITHER,

Plaintiff-Appellant,

versus

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(1:94-CV-75-C)

(Filed Nov. 13, 1996)

Before REYNALDO G. GARZA, JONES, and DeMOSS, Circuit Judges.

PER CURIAM:*

The court has carefully considered the points raised by appellant in light of the briefs, oral argument and pertinent portions of the record and concludes that the district court committed no reversible error of law or fact in

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

rendering his judgment, which is therefore AFFIRMED. See Fifth Circuit Local Rule 47.6.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

CHARLES S. GAITHER, Plaintiff, v. THE ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. 1:94-CV-075-C

JUDGMENT

(Filed Sep. 18, 1995)

The Court on this date has entered an order making findings of fact and conclusions of law concerning the above-styled and -numbered cause. For the reasons set forth in the order, the Court renders the following judgment:

It is ORDERED, ADJUDGED, and DECREED that the Plaintiff, CHARLES S. GAITHER, take nothing as against the Defendant, THE ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA. All court costs are taxed against Plaintiff.

Dated this 16th day of September, 1995.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

CHARLES S. GAITHER, Plaintiff, v. THE ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. 1:94-CV-075-C

ORDER

(Filed Sep. 18, 1995)

After hearing the testimony and reviewing the exhibits admitted into evidence, the Court makes the following findings of fact and conclusions of law as shown on Exhibit "A" attached hereto and incorporated herein as if set forth in full.

Based upon such findings and conclusions, the Court orders that judgment be entered for Defendant. Plaintiff shall bear all costs of court.

IT IS SO ORDERED.

Dated this 16th day of September, 1995.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

CHARLES S. GAITHER, Plaintiff, v. THE ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. 1:94-CV-075-C

EXHIBIT "A"

FINDINGS OF FACT

1. On March 24, 1988, Plaintiff, Charles S. Gaither, entered on duty as a GS-007-11 (GS 11) Correctional Supervisor, also known as a GS 11 Lieutenant, at the Federal Correctional Institution, Oxford, Wisconsin (FCI Oxford). Immediately prior to this assignment, Plaintiff was a GS-9 lieutenant at the Federal Correctional Institution, Fort Worth, Texas (FCI, Ft. Worth).

2. On July 27, 1988, plaintiff's supervisor, Captain Greg Mackey, proposed that plaintiff be demoted from Correctional Supervisor GS 007-11 to the position of Senior Officer Specialist, GS 007-08. (SEE EXHIBIT 1) Plaintiff was charged with failing to carry out the instructions of his supervisors, insubordination, and making a false statement in connection with his official duties. These acts occurred on July 22, 1988.

3. On August 28, 1988, the Warden at Federal Correctional Institution (FCI) Oxford, Wisconsin, E.J. Brennan, upheld the charges, but only demoted plaintiff to the position of Correctional Counselor, GS 007 9, effective August 28, 1988. Warden Brennan's letter explained plaintiff's appeal rights under both the MSPB and EEO procedures.

4. By letter dated August 30, 1988, plaintiff wrote North Central Regional Director Larry DuBois contesting his demotion.

5. BOP North Central Regional (NCRO) Director Larry DuBois wrote plaintiff a letter on September 1, 1988 informing plaintiff he was being reassigned to the United States Penitentiary (USP) at Marion, Illinois to further the needs of the BOP.

6. In a timely manner the Plaintiff contacted an EEO officer.

7. Plaintiff filed an appeal with the MSPB on September 8, 1988. In his appeal, plaintiff claimed that the actions of the FCI Oxford staff in demoting him were racially motivated and that he had filed a formal complaint with the EEOC [sic] that same day.

8. MSPB Judge Ansorge ordered the plaintiff to show cause as to why his appeal should not be dismissed on the ground that his petition for appeal to the MSPB was premature because he had filed a formal EEO complaint the day before appeal to MSPB. Judge Ansorge specifically detailed the EEO time limitations relevant to Plaintiff.

9. On September 27, 1988 plaintiff wrote Judge Ansorge a letter explaining that he had made a "mistake" and never formally filed an EEO complaint. In this letter Plaintiff requested the MSPB hear his discrimination claims.

10. On October 3, 1988, USP Unit Manager at Marion, Illinois, Harvey Brooks, wrote a letter to plaintiff notifying plaintiff that Brooks proposed that he [plaintiff] be removed from his position as Correctional Counselor at USP Marion within 30 days for failing to carry out a proper work order and excessive unexcused absences.

11. On October 12, 1988, plaintiff wrote a letter to Warden Gary Henman, USP Marion. In this letter, plaintiff claimed to be "mentally unfit for duty" and requested annual leave for the days he had been absent, plus annual leave for another month.

12. Warden Henman denied plaintiff's requests.

13. On October 24, 1988 NCRO Director Larry DuBois, referencing a conversation plaintiff had with Regional Personnel Administrator R.O. Lendof, reassigned plaintiff to the Metropolitan Correctional Center (MCC) at Chicago, Illinois. Plaintiff responded, admitting that he had previously agreed in a telephone conversation with Lendof to move to MCC, Chicago, but he was still mentally unfit for duty and asked to be put on leave without pay status.

14. NCRO Director DuBois wrote plaintiff a letter on November 3, 1988 informing plaintiff that he would not be eligible for leave without pay status and would be

disciplined if he refused to report for duty at MCC Chicago.

15. On January 7, 1989 plaintiff wrote Judge Ansorge a letter and requested the record be reopened in order for him to submit evidence of further discriminatory actions by the BOP. Plaintiff alleged that Mr. DuBois' refusal to grant him leave without pay and decision to reassign plaintiff to MCC Chicago were racially motivated. This was subsequently denied as untimely.

16. By letter dated January 3, 1989, Warden A.F. Beeler, Metropolitan Correctional Center, Chicago, Illinois, (MCC, Chicago) wrote Plaintiff sustaining charges against Mr. Gaither of failure to accept an assignment and absent without leave. Warden Beeler stated, in part: "[A]ccordingly, it is my decision that you be removed from your position effective midnight January 6, 1989."

17. Judge Ansorge rendered an Initial Decision in favor of the BOP on January 10, 1989 on the demotion appeal. Judge Ansorge held that the charges against plaintiff were supported by a preponderance of the evidence, plaintiff's demotion was found to promote the efficiency of the service, plaintiff failed to provide any evidence of racial discrimination, and the demotion was reasonable. Additionally, the plaintiff was informed he could appeal the decision to the MSPB before the initial decision became final, appeal the decision on the racial discrimination issues to the EEOC no later than 30 days after the initial decision became final, appeal both the discrimination and nondiscrimination issues to a federal district court no later than 30 days after the initial decision became final, and appeal the nondiscrimination

issues no later than 30 days after the initial decision became final. This decision was later vacated by the MSPB by an Order dated March 9, 1990.

18. Plaintiff wrote a letter to Dr. Gil Ingram [Dr. G. L. Ingram], Assistant Director, BOP, dated January 10, 1989, expressing concern by reason of being terminated, and requesting assistance to be allowed to continue his employment with the BOP. This letter contains no mention of Plaintiff's demotion or request to be restored to his previous GS-11 grade.

19. On January 23, 1989, the plaintiff appealed his termination of employment from the BOP to the MSPB. (Case #*CH07528910206*)

20. Between January 10 and January 27, 1989, plaintiff had a telephone conversation with Dr. G. L. Ingram [Dr. Gil Ingram], who. was Assistant Director for the Bureau Of Prisons and Director for Correctional Programs at that time.

a. At the time of this conversation, Mr. Gaither had received the MSPB initial decision against him in his demotion appeal, and had also received the letter from A.F. Beeler stating that he was terminated.

b. After the conversation with Dr. G.L. Ingram, Plaintiff accepted a transfer to the BOP Big Spring facility. Plaintiff also requested that his appeals to the MSPB be dismissed.

c. Plaintiff entered into a settlement agreement with the Dr. Ingram of the BOP whereby both his demotion appeal to the MSPB, being cause number CH0752881675 and his termination of employment appeal

resulting from his failure and/or refusal to report as ordered to MCC, Chicago to the MSPB, being cause number CH07528910206 were settled; and by terms thereof, Plaintiff withdrew both MSPB appeals, was reinstated as an employee of the BOP and at the position of GS-9 Correctional Counselor, and voluntarily agreed to transfer to the BOP facility at Big Spring, Texas.

21. On March 14, 1989, BOP Attorney Jim Foley motioned to dismiss plaintiff's appeal of the removal action (*CH07528910206*) because the BOP had rescinded its decision to remove plaintiff. Mr. Foley wrote this was done pursuant to an agreement in which plaintiff would be reassigned to FCI Big Spring.

22. On March 15, 1989, Judge Manrose issued an Initial Decision in case number *CH07528910206*, dismissing plaintiff's appeal of his removal.

23. On March 27, 1989, BOP Attorney Jim Foley motioned to dismiss plaintiff's appeal of his demotion action (*CH07528810675*) based on the oral agreement between plaintiff and Dr. Ingram in which plaintiff would be transferred to FCI Big Springs in exchange for his dismissal of the appeals in *CH07528810675* and *CH07528910206*.

24. On April 4, 1989 plaintiff wrote a letter to MSPB Clerk Robert Taylor requesting his appeal of the Initial MSPB Decision in *CH07528810675* be dismissed.

25. On April 7, 1989, plaintiff wrote a letter to Dr. Ingram indicating the terms of the agreement included his reinstatement as a GS-11 Lieutenant and back pay from July 26, 1988 to March 5, 1989.

26. On December 12, 1989, plaintiff wrote MSPB Clerk Robert Taylor a letter requesting his appeal of the Initial MSPB decision in *CH07528810675* be activated because of a mutual misunderstanding between himself and Dr. Ingram.

27. On March 9, 1990, MSPB Chairman Daniel Levinson and MSPB Vice Chairman Maria Johnson rendered a final order in *CH07528810675*. The Board held that, 1) plaintiff had failed to show that there was an unintentional misunderstanding between himself and the BOP or that such a misunderstanding caused him to withdraw his appeal, 2) since the agreement between plaintiff and the BOP was not submitted into the record, the MSPB could not enforce the agreement, 3) the withdrawal removed the appeal from the MSPB's jurisdiction, and 4) plaintiff's appeal was dismissed and the initial decision was vacated. The order also provided plaintiff notice that he had only 30 days to appeal the final decision to United States Court of Appeals for the Federal Circuit.

28. Plaintiff did not, and has not to this date, appealed the Final Order of the MSPB to the United States Court of Appeals for the Federal Circuit, or any other court whatsoever.

29. Plaintiff met several times during the year of 1990 with Mr. Charles Turnbo, Regional Director, BOP, South Central Region, and Mr. Michael Fitzpatrick, Warden at the federal prison facility at Big Spring, sometimes separately, and sometimes jointly to discuss and encourage Mr. Gaither to make application for a promotion to

GS-11. One of these meeting [sic] was in May 1990, and one on or about June 12, 1990.

a. Mr. Turnbo told plaintiff that plaintiff had exhausted all of his appeals and that he would be willing to look at the possibilities of his promotion to GS-11 lieutenant; and encouraged plaintiff to apply for a position of GS-11 lieutenant.

b. On June 12, 1990, plaintiff met with both Director Turnbo and Warden Fitzpatrick, who encouraged plaintiff to apply for a GS-11. Mr. Turnbo told plaintiff that if plaintiff would apply for a GS-11 lieutenant position, Mr. Turnbo would select him for that position.

c. Plaintiff has failed and refused to apply for a position equivalent to the GS-11 position from which he was demoted in 1988, and still fails and refuses to so apply, although he has been urged on numerous occasions to do so, although there were good and sufficient reasons to believe that Plaintiff's application for promotion would have been granted.

d. Director Turnbo would have promoted Plaintiff to the position of GS-11 on or about June 12, 1990, if Plaintiff would have made application for promotion.

30. Since plaintiff has been assigned to the federal prison at Big Spring, between sometime in March 1989 and the date of his deposition on April 21, 1995, he has not applied for the promotion to his previous position of GS-11.

31. In response to communications from Plaintiff, BOP EEO Officer Jane B. Redmon wrote a letter dated to Oct. 7, 1991,

a. By this letter Ms. Redmon, among other things, advised Plaintiff that if he wanted to pursue a complaint of discrimination to contact an EEO counselor at FCI Big Spring within 30 calendar days from receipt. Plaintiff talked to EEO Counselors at Big Spring at a time unspecified , but he did not talk with them about an EEO complaint on his demotion, and he did not apply for EEO assistance at that time.

b. Also, in this letter, Ms. Redmon advised that since Plaintiff had initially filed an appeal with MSPB on this matter, that an EEO complaint on the same matter would be rejected, citing 29 C.F.F. § 1613.403 and § 1613.405. In addition Ms. Redmon advised Plaintiff that the settlement agreement might not be enforceable through the complaint process since it was effected in regard to the MSPB appeal.

32. By letter dated Oct. 25, 1991, Ms. Redmon sent Plaintiff a copy her correspondence to the Chief of BOP Office of Internal Affairs (OIA), Al Kanahele. In both correspondence, reference was made to the fact that Plaintiff did not wish to pursue an EEO complaint, but instead was requesting an OIA investigation into Plaintiff's allegations.

33. Sometime between October 7, 1991, and October 18, 1991, Plaintiff ceased to pursue the filing of an EEO complaint, and elected instead to request an OIA investigation of his allegations.

34. On September 22, 1992, Plaintiff meet [sic] with EEO counselor at FCI Oxford, and on October 23, 1992 Plaintiff signed a formal EEO complaint alleging he was discriminated against on the basis of his race and color,

which complaint was filed with the BOP on November 4, 1992. This EEO complaint is the first EEO complaint signed by Plaintiff.

35. The EEO complaint filed by Plaintiff on November 4, 1992

a. alleges:

1) at item 5, that the date on which the most recent alleged discrimination took place was July 22, 1988.

2) the same subject matter which was the subject matter of Plaintiff's previous appeal to the MSPB filed September 8, 1988, in cause CH07528810675 (See Exhibit 6), and which was the subject matter of the MSPB final order dated March 9, 1990.

36. The filing of EEO complaint by Plaintiff on November 4, 1992 was subsequent to his demotion; subsequent to the transfer orders to the federal prison at Marion, Illinois, and MCC Chicago, and agreed transfer to FPC Big Spring; and subsequent the requests by Regional Director Turnbo and Warden Fitzpatrick that Plaintiff apply for promotion to GS-11, and their indication that same would be effectuated.

37. In response to item 8: "What Corrective Action Do You Want Taken on Your Complaint?" the Plaintiff stated:

> What I want now and what I've always wanted is for an internal investigation to be conducted into the incident occurring on the above date. I feel that an investigation will reveal that Associate Warden Lenny W. Graves' actions were

> prompted solely because of my race. I would also point out that I have been demoted because of this incident and that I did not receive a paycheck for 6 months following this incident. I do not feel that an employee should have been discriminated against by the Federal Bureau of Prisons because of his race or color and that is why I feel so strongly about an internal investigation being conducted and I feel that I should be reinstated to my former position.

38. On June 3, 1993, the BOP issued a final agency decision rejecting plaintiff's complaint. The complaint was rejected according to the agency because the plaintiff failed to contact an EEO Counselor until September 8, 1992 and initialiy elected to file a mixed case appeal directly with the MSPB. Plaintiff appealed this decision to the EEOC on June 26, 1993.

39. On September 16, 1993, the EEOC issued a decision in which the Bureau of Prison's decision to reject Plaintiff's complaint was reversed and Plaintiff's complaint was remanded to the agency for further processing. The decision of the EEOC also ordered that the Bureau of Prisons was to, within thirty days of receipt of the decision, "conduct an inquiry" to determine whether Plaintiff contacted an EEO counselor within thirty days of June 22, 1988, whether Plaintiff filed an appeal with the MSPB prior to filing a complaint concerning the same matter with the commission and, if he did file an appeal with the MSPB prior to filing with the commission, whether Plaintiff was informed by any agency official of the consequence of electing to initially file an appeal with the board.

40. Any and all claims of discrimination, including retaliation, failure or refusal to reinstate Plaintiff with back pay to the grade of GS-11 previously held by him from which he was demoted, all of which claims of discrimination and retaliation Defendant denies, were well known to him, and/or with reasonable diligence should have been known to him more than 45 days prior to his contact with an EEO counselor on September 22, 1992, and/or prior to the effective date of the Civil Rights Act of 1991, including the various times, dates and/or events set out below:

a. The times and dates on which he filed his two (2) appeals to the MSPB.

b. When he made a settlement agreement with a representative of the BOP as set out above to which reference is made.

c. At the times and dates on which he withdrew his appeals to the MSPB in the actions set out above, to which reference is made.

d. Upon receipt of his first pay check subsequent to his being transferred to the BOP facility at Big Spring, Texas.

e. Plaintiff's letter to Dr. Gil Ingram dated April 7, 1989, regarding the failure of the BOP to reinstate him with back pay to the grade of GS-11; and Plaintiff's discussions with BOP representative Jim Foley thereafter.

f. The entry of the MSPB final order on March 9, 1990 in MSPB action CH0752881675, mentioned above.

g. His meetings and conversations with BOP personnel, including but not limited to those meetings with Regional Director, South Central Region, Warden Michael Fitzpatrick, Big Spring, Texas, and other BOP personnel at the instance of Mr. Turnbo or Mr. Fitzpatrick or both, in May and June of the year of 1990.

h. At the time and dates of various conversations and correspondence and between Plaintiff and Mr. Jim Foley during the years 1989 and 1990.

i. The dates of various communications by correspondence and telephone by and between Plaintiff and Director Charles Turnbo during the calendar years of 1989, 1990, 1991 and up to and including July, 1992.

j. The dates of various communications by and between Plaintiff and Director of BOP Michael Quinlan during the calendar years of 1990, and 1991.

k. The dates of various communications by telephone and correspondence by and between Plaintiff and Jane Redmon, EEO officer, BOP; and by and between Plaintiff and Ted McBurrows, Director, EEO Staff, Justice Management Division, Department of Justice, during the calendar year 1991 and up to and including June 1992.

41. Plaintiff's relief from duty, demotion and transfers of duty assignment occurred prior to Plaintiff's EEO complaint filed in [sic] November 4, 1992 and his appeal there from to the EEOC; therefore, obviously, Plaintiff's relief from duty, demotion and transfers of duty

assignment were not caused by the 1992 filing of the EEO complaint and subsequent charge with the EEOC.

CONCLUSIONS OF LAW

1. Plaintiff's claims, together with the relief requested, which are predicated on his removal of duty on July 22, 1988, subsequent demotion, subsequent transfer to the BOP prison at Marion, Illinois, to which he did not report, subsequent retransfer to the Metropolitan Correctional Center (MCC), Chicago, Illinois; and termination from BOP employment for refusal to report to MCC, Chicago, were resolved by settlement agreement by Plaintiff and a representative of the Bureau of Prisons, a part of the Department of Justice Executive Branch of the United States. Plaintiff's reinstatement of employment with the Bureau of Prisons, and transfer to the BOP facility at Big Spring, Texas, was a voluntary transfer by Plaintiff pursuant to a settlement agreement by Plaintiff with a representative of the Bureau of Prisons, on behalf of the Bureau of Prisons. *Kirby v. Dole*, 736 F.2d 661, (5th Cir. 1984); *Fulgence v. J. Ray McDermott & Co*, 662 F.2d 1207, 1209 (5th Cir. 1981) [holding an oral settlement is valid]; *Strozier v. General Motors Corporation*, 635 F.2d 424 (5th Cir. 1981) (per curium); *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L. Ed. 187 (1976); and *Wilmes v. United States Postal Service*, 810 F.2d 130, (7th Cir. 1987).

2. Plaintiff's demotion and subsequent transfer to the Bureau of Prisons Facility at Marion, Illinois and then re-transfer to the Metropolitan Correctional Center at

Chicago, Illinois, were justified and were for non-discriminatory and non-retaliatory reasons. Plaintiff's termination from employment with the BOP was for non-discriminatory and non-retaliatory reasons.

3. The Plaintiff has not been reinstated by the BOP to his previous position of GS-11 lieutenant for good, sufficient, nondiscriminatory, and non-retaliatory reasons.

4. By reason of the settlement entered into by Plaintiff with Dr. Ingram, and withdrawal of his appeals in both MSPB actions:

a. This Court lacks subject matter jurisdiction of the claims upon which the MSPB appeals were predicated.

b. Plaintiff has failed to state a cause of action upon which relief may be granted.

c. Plaintiff's claims upon which such MSPB appeals were predicated are barred by settlement.

d. Plaintiff abandoned his claims upon which such MSPB appeals were predicated.

e. Plaintiff failed to exhaust his administrative remedies regarding his claims upon which such MSPB appeals were predicated.

Martin v. United States Post Office, 752 F.Supp. 213, 217 (N.D. Tex. 1990); *Hays v. Postmaster General of the United States*, 868 F.2d 328, 329, (9th Cir. 1989); *Blaney v. United States*, 34 F.3d 509, 512-513, (7th Cir. 1994); *Vinieratos v. United States Department of Air Force*, 939 F.2d 762, 768-69, & 772-75, (9th Cir. 1991); and *James v. Levinson*, 680 F.Supp. 187, 190-91, (E.D. Pa. 1988).

5. Plaintiff accepted the benefits of the settlement with the BOP as set forth in paragraphs 1, 2, and 4 hereinabove, and Plaintiff is estopped from rejecting any part of such settlement.

6. The Plaintiff failed to appeal the March 9, 1990, MSPB final order in MSPB case number *CH07528810675* to United States Court of Appeals for the Federal Circuit (or any federal court whatsoever); therefore:

a. An appeal from this decision is time barred.

b. This court does not have subject matter jurisdiction over the claims upon which this MSPB action was predicated.

c. This Court does not have subject matter jurisdiction over the issues determined in said final decision of the MSPB.

d. Plaintiff abandoned the claims upon which this MSPB action was predicated.

e. Plaintiff cannot state a claim upon which relief can be granted as to any claim or issue upon which this MSPB action was predicated, nor upon any issue determined by the final decision of the MSPB on March 9, 1990.

f. This court does not have subject jurisdiction to review the determination of the MSPB upholding the settlement agreement by Plaintiff with the Bureau of Prisons; and such is now time barred.

Ballentine v. Merit Systems Protection Board, 738 F.2d 1244, 1246-47, (Fed. Cir. 1984); *Blake v. Department of Air Force*, 794 F.2d 170 (5th Cir. 1986); *Wall v. United States*, 871 F.2d 15400, 1542-43 (10th Cir. 1989); *Soruill v. Merit Systems Protection Board*, 978 F.2d 679, (Fed. Cir. 1992); *Hays v.*

Postmaster General of the United States. Id. at 330-31 and *Spears v. Merit Systems Protection Board,* 766 F.2d 520, 522-23, (Fed. Cir. 1985). Also, *Pacheco v. Rice,* 966 F.2d 904, 906 (5th Cir. 1992); *Mascheroni v. Board Of Regents Of The University of California,* 28 F.3d 1554, 1562, (10th Cir. 1994); *Moskowitz v. Trustees of Purdue University,* 5 F.3d 279, 282 (7th Cir. 1993); *Baldwin County Welcome Center v. Brown,* 466 U.S. 147, 151 (1983); and *Delaware State College v. Ricks,* 449 U.S. 250, 259-60 (1980).

7. Plaintiff's claims asserted in his two appeals to the MSPB mentioned above did not survive:

a. The settlement agreement between Plaintiff and the BOP.

b. The voluntary withdrawal of same by Plaintiff,

c. The dismissal of such appeals by the MSPB,

d. The failure of Plaintiff to appeal the final order of the MSPB in his demotion appeal, being MSPB cause number CH0752881675.

Therefore, this court lacks subject matter jurisdiction over Plaintiff's cause of action; and Plaintiff has failed to state a claim on which relief may be granted.

8. In the event any of Plaintiff's claims survived the settlement agreement with the BOP, dismissal of his two MSPB appeals, and failure to appeal the MSPB final order in his demotion appeal, then:

a. Plaintiff abandoned such claims.

b. Plaintiff abandoned, and in the alternative, deliberately obstructed and interfered with the EEO process, including but not limited

to, advising BOP EEO officer Redmon in October, 1991 that he did not want to pursue an EEO complaint.

c. Plaintiff failed to pursue such claims with due diligence.

d. Plaintiff failed to exhaust his administrative remedies regarding such claims.

e. Plaintiff did not timely file an EEO complaint, and such claims are time barred.

f. Plaintiff failed to timely file an action on such claims, and such claims are time barred.

Therefore this court lacks subject matter jurisdiction over Plaintiff's cause of action; and Plaintiff has failed to state a claim on which relief may be granted.

9. Plaintiff was precluded from filing an EEO Complaint with the BOP on November 4, 1992, and a charge with the EEOC on June 26, 1993, on the issues relating to his relief from duty on July 22, 1988, his demotion from GS-11 Correctional Supervisor to Correctional Counselor GS-9 effective August 28, 1988 by reason of:

a. His election to appeal to the Merit System Protection Board September 8, 1988, being Cause No. CH07528810675.

b. A settlement by reason of an agreement with Dr. Gil Ingram on behalf of the BOP in January, 1989.

c. His voluntary withdrawal of his appeal with MSPB in Cause No. CH07528810675.

d. The final order of the MSPB in Cause CH07528810675 (demotion action) upholding the settlement agreement between Plaintiff and Dr. Ingram on behalf of the BOP.

e. His failure to appeal the final order of the M#B in Cause No. CH07528810675 to the federal circuit or any other federal court.

f. His abandonment of such claims.

g. His failure to exhaust his administrative remedies as to such claims.

h. His failure to pursue such claims with due diligence.

i. His failure to timely file a complaint with the EEO, which was time barred on the date actually filed.

j. Plaintiff's obstruction and interference with the EEO process.

Therefore, this court lacks subject matter jurisdiction over Plaintiff's cause of action; and Plaintiff has failed to state a claim on which relief may be granted.

10. This court does not have subject matter jurisdiction, and in addition Plaintiff has failed to state a claim upon with relief may be granted because Plaintiff's claims of discrimination, any and all, including retaliation, failure or refusal to reinstate Plaintiff with back pay to the grade of GS-11 previously held by him from which he was demoted, were well known to him, and/or with reasonable diligence should have been known to him more than 45 days prior to his contact with an EEO counselor on September 22, 1992, and/or prior to the effective date of the Civil Rights Act of 1991, and Plaintiff

did not pursue his claims with diligence; and also Plaintiff abandoned same and obstructed the EEO process; failed to timely contact the BOP EEO counselor; and failed to timely file his EEO complaint with the agency, and his claims are time barred.

11. The Civil Rights Act of November 21, 1991, Pub. L. 102166, 105 Stat. 1071 is inapplicable because Plaintiff's claims relate to events which arose prior to the effective date of such statute. *Landgraf v. USI Film Products,* 114 S. Ct. 1483, held that the Civil Rights Act of 1991, Pub. L. 102-106, 105 Stat. 1071, did not apply retroactively to discriminatory conduct which occurred prior to the November 21, 1991, the effective date of the Act. See also *West v. Resolution Trust Company,* 22 F.3d 99, 100 (5th Cir. 1991) and *Garcia v. Elf Atochem North America,* 28 F.3d 466, 449-450 (5th Cir. 1994). Therefore, the Plaintiff has failed to state a claim under the Civil Rights Act of 1991 upon which relief may be granted, and this Court lacks subject matter jurisdiction to make an award under such Act, and specifically those damages set forth in 42 U.S.C. § 1981(a), such as mental anguish and emotional distress.

12. Plaintiff's EEO complaint limits the date on which the most recent alleged discrimination took place as the date of July 22, 1988. Plaintiff's allegations of discrimination are limited to events which occurred on that date. Since Plaintiff did not raise the claims of retaliation, nor did he raise the claim that he had not been reinstated because of discrimination; and no mention is made by Plaintiff in his EEO complaint that his transfers of duty assignments (previously mentioned) were the result of discrimination, this Court does not have subject matter jurisdiction over such claims which were not

raised in Plaintiff's EEO complaint. *Cheek v. Western and Southern Life Ins. Co.*, 31 F.3d 497 (7th Cir. 1994); *Johnson v. Bergland*, 614 F.2d 415, 417-418; and *McAdams v. Reno*, 858 F. Supp. 945, 952 (D. Minn. 1994). Also, Plaintiff has failed to state a claim for relief upon which relief may be granted as to such claims.

13. By reason of 42 U.S.C. § 2000e-5(g)(1), Plaintiff damages for back pay (lost wages and benefits) is limited to a period of not more than two (2) years prior to the filing of the EEO charge with the EEO Commission, which filing occurred on June 23, 1993. Furthermore, Plaintiff must use reasonable diligence to reduce such otherwise allowable back pay. Plaintiff has failed to use reasonable diligence to reduce such allowable back pay for a period of more than two (2) years prior to the filing of his complaint with the BOP and charge with the EEOC, and is not entitled to an award of back pay in this case. *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1468-69, (5th Cir. 1989); *Figgs v. Quick Fill Corp.*, 766 F.2d 901, 902-903 (5th Cir.1985); and *Equal Employment Opportunity Commission v. Service News Co.*, 898 F.2d 958, 963, (4th Cir. 1990).

14. Since Plaintiff has failed and refused, or in the alternative, failed to exercise reasonable diligence, to mitigate such damages by applying for promotion to a position of GS-007-11 (GS-11) Correctional Supervisor; and has so failed and refused for a period of more than two years prior and continues to so fail and refuse, is not entitled to damages for back pay. *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461,1468-69, (5th Cir. 1989); *Figgs v. Quick Fill Corp.*, 766 F.2d 901, 902-903 (5th

Cir.1985); and *Equal Employment Opportunity Commission v. Service News Co.*, 898 F.2d 958, 963, (4th Cir. 1990).

15. Since Plaintiff has failed and refused to mitigate his back pay damages by applying for a promotion to a position of GS-007-11 Correctional Supervisor, although urged by BOP personnel, including the Regional Director of the South Central Region, and the Warden at FCI Big Spring, on or about May and June 1990, and on subsequent dates in the year of 1990, and that the time Plaintiff had reason to believe that had he so applied for such promotion, then such promotion would have been made to him, Plaintiff is not entitled to back pay and benefits. *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1468-69, (5th Cir. 1989); *Figgs v. Quick Fill Corp.*, 766 F.2d 901, 902-903 (5th Cir.1985); and *Equal Employment Opportunity Commission v. Service News Co.*, 898 F.2d 958, 963, (4th Cir. 1990).

16. Plaintiff is precluded from recovering back pay and benefits for the period of time that he was absent without leave from work by reason [sic] 42 U.S.C. § 2000e-5(g)(1). Mitigation of damages encompasses remaining on the job. *Jurgens v. Equal Employment Opportunity Commission*, 903 F.2d 386, 391, (5th Cir. 1990).

47.6 Affirmance Without Opinion. *The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion, enter either of the following orders: "AFFIRMED. See 5TH CIR.R. 47.6." or "ENFORCED. See 5TH CIR.R. 47.6."*

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

* * *

§ 7702. Actions involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who –

> **(A)** has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and
>
> **(B)** alleges that a basis for the action was discrimination prohibited by –
>
> > **(i)** section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),
> >
> > **(ii)** section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),
> >
> > **(iii)** section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),
> >
> > **(iv)** sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or
> >
> > **(v)** any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

* * *

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection(a)(2) of this section.

* * *

§ 1613.213 Precomplaint processing.

(a) The agency shall require that an aggrieved person who believes that he or she was discriminated against because of race, color, religion, sex, national origin, age or handicapping condition consult with an Equal Employment Opportunity Counselor to try to resolve the matter. The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he or she believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the issues in the matter; to keep a record of the counseling activities so as to brief, periodically, the Equal Employment Opportunity Officer on those activities; and, when advised that a complaint of discrimination has been accepted from an aggrieved person, to submit a written report to the Equal Employment Opportunity Officer, with a copy to the aggrieved person, summarizing the counselor's actions and advice both to the agency and the aggrieved person concerning the issues in the matter. The Equal Employment Opportunity Counselor shall, insofar as is practicable, conduct the final interview with the aggrieved person not later than 21 calendar days after the date on which the matter was called to the counselor's attention by the aggrieved person. If, within 21 days, the matter has not been resolved to the satisfaction of the aggrieved person, that person shall be immediately informed in writing, at the time of the final interview, of his or her right to file a complaint of discrimination. The notice shall inform the complainant of his or her right to file a discrimination complaint at any time up to 15 calendar days after the receipt of the notice of the appropriate official with whom to file a

complaint and of complainant's duty to assure that the agency is immediately informed if the complainant retains counsel, or any other representative. The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Equal Employment Opportunity Counselor shall not reveal the identity of an aggrieved person who consulted the counselor, except when authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from that person.

* * *

§ 1613.214 Filing and processing of complaint.

* * *

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall transmit it to the Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with paragraph (a)(3) of this section.

* * *

§ 1613.215 Rejection or cancellation of complaint.

(a) The agency head or designee shall reject or cancel a complaint:

(1) That fails to state a claim under § 1613.212 or that states the same claim that is pending before or has been decided previously by the agency;

(2) That alleges that an agency is proposing to take action that may be discriminatory;

(3) That is the basis of a pending civil action in a United States District court in which the complainant is a party;

(4) That is filed untimely, unless the agency extended the time limits in accordance with § 1613.214(a)(4);

(5) That the complainant elected to pursue under a negotiated grievance procedure as identified in § 1613.219;

(6) That the complainant has failed to prosecute. The agency may cancel an allegation or a complaint for failure to prosecute only after it has provided the complainant with a written request that includes a notice of the proposed cancellation, to provide certain information or otherwise proceed with the complaint, and the complainant has failed to satisfy the request within 15 calendar days of its receipt. However, instead of canceling for failure to prosecute, the complaint may be adjudicated if sufficient information for that purpose is available; or

(7) If the complainant refuses within 15 calendar days of receipt of an offer of settlement to accept an agency offer of full relief in adjustment of the complaint, provided that the agency's Director of Equal Employment Opportunity, or a designee reporting directly to the Director, has certified in writing that the agency's written offer of relief constitutes full relief. An offer of full relief

under this subsection is the appropriate relief in § 1613.271. The offer need not contain the decision whether disciplinary action is necessary, but the basis for the decision shall be recorded separately from the complaint file.

* * *

§ 1613.402 Definitions.

(a) *Mixed Case Complaint.* A mixed case complaint is: (1) A complaint of employment discrimination filed with a federal agency, based on race, color, religion, sex, national origin, handicap, age, and/or reprisal, related to, or stemming from an action taken by an agency against the complainant, which action may be appealed to the MSPB, pursuant to any law, rule or regulation; or (2) a complaint of sex-based wage discrimination, filed with the Commission, related to or stemming from an action taken by an agency against a complainant, which action may be appealed to the MSPB, pursuant to any law, rule or regulation. The complaint may contain only an allegation of employment discrimination or it may contain additional allegations which the MSPB has jurisdiction to address.

* * *

§ 1613.403 Election.

An aggrieved person may initially file a mixed case complaint with an agency, pursuant to this part, or (s)he may file a mixed case appeal directly with the MSPB, pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action which is appealable to the MSPB and who has raised the issue of discrimination either orally or in writing, during the processing of the action, of his/her right to file a mixed case complaint, if the employee believes the action to be based, in whole or in part on discrimination, or to file a mixed case appeal with the MSPB. The person shall be advised that (s)he may not initially file both and that

whichever is filed first (the mixed case complaint or the appeal) shall be considered an election to proceed in that forum. For the purposes of this subsection, filing of a mixed case complaint occurs when the complaint is filed with an appropriate agency official, in accordance with § 1613.214(a)(3) of Subpart B of this part.

* * *